DEC. 11, 1980

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SUPREME COURT, U.S.

No. 80-5902

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

BRENDA J. DE PRIEST, Appellant,

v.

COMMISSIONER ROBERT J. BIBLE,
TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY,
AND
COMMISSIONER SAMMIE LYNN PUETT,
TENNESSEE DEPARTMENT OF HUMAN SERVICES, Appellees.

ON APPEAL FROM

THE MIDDLE SECTION OF THE COURT OF APPEALS

OF THE STATE OF TENNESSEE

# JURISDICTIONAL STATEMENT

Ralph K. Helge
Counsel of Record
Rader, Helge & Gerson
Union Bank Building
Suite 706
201 South Lake Avenue
Pasadena, California
213/577-5380

Harvel M. Rogers Jr.
151 Athens Way
Metro Center
Nashville, Tennessee
615/244-7670

Counsel for Appellant

## QUESTIONS PRESENTED

(1) Whether Tennessee Code Annotated, Section 50-1324(A), violates the Free Exercise of Religion and/or the Establishment of Religion Clauses of the First Amendment of the Constitution of the United States when applied by the State of Tennessee to deny unemployment compensation benefits to a state employee fired for refusing to work on holy days of her religion?

(2) Whether the Constitution requires that the State of Tennessee must demonstrate a compelling state interest when applying Tennessee Code Annotated, Section 50-1324(A), to deny unemployment compensation benefits to a discharged state employee who was discharged for absence from work to attend religious holy days?[1]

[1]All parties are listed in the caption of this case.

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## OPINIONS BELOW

The opinion of the Middle Section of the Court of Appeals of the State of Tennessee (see Appendix hereto, hereinafter referred to as "App." at page 1a) has not been reported. The denial of permission to appeal to the Supreme Court of Tennessee (App. p. 14a), dated September 15, 1980, the opinion and order of the Chancery Court for Davidson County, Tennessee, dated October 15, 1979 and October 19, 1979, (App. pp. 3a & 15a, respectively), the order of the Board of Review of the Tennessee Department of Employment Security, dated April 12, 1979, (App. p. 16a) and the determination of the Appeal Referee of the Appeals Tribunal of the Tennessee Department of Employment Security, dated December 29, 1978, (App. p. 17a) have likewise not been reported.

## JURISDICTION

Appellant De Priest was dismissed from employment by the State of Tennessee because of absences from work to observe religious holy days. Special leave of absence (without pay), as provided for by regulation, to attend said holy days had been denied by the State. Mrs. De Priest's subsequent application for unemployment compensation was denied on authority of Tennessee Code Annotated, Section 50-1324(A), the constitutionality of which is contested by this appeal.

The judgment of the Court of Appeals of Tennessee, Middle Section, affirming the decisions of the Chancery Court of Davidson County, Tennessee, and the Tennessee Department of Employment Security, in denying unemployment compensation benefits, was entered on June 27, 1980. (App. p. 1a). These decisions sustained the Tennessee Department of Employment Security's interpretation of Tennessee Code Annotated, Section 50-1324(A). An application for permission to appeal to the Supreme Court of Tennessee was denied on September 15, 1980 (App. p. 14a).

A notice of appeal to this Court was filed in the Court of Appeals of Tennessee, Middle Section, on October 24, 1980.

This appeal is being docketed in this Court within 90 days of the denial of application to appeal to the Supreme Court of Tennessee. The jurisdiction of the Court is invoked under 28 United States Code, Sections 1257(2) and 2101(C).

The position that the Tennessee Department of Employment Security's application of Tennesse Code Annotated, Section 50-1324(A), is repugnant to the First and Fourteenth Amendments, and therefore infringes Mrs. De Priest's rights to freedom and nonestablishment of religion, was raised in the first administrative hearing on December 20, 1978. It has been reiterated at each subsequent proceeding up to and including the Tennessee State Supreme Court.

The Chancellor in the Chancery Court specifically found that the aforementioned statute did not violate the First and Fourteenth Amendments. The Court of Appeals affirmed the Chancellor without specifically addressing this question although it was asserted and briefed to them. The same question was asserted and briefed in the application to the Tennessee Supreme Court for permission to appeal. Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 284 (1971), demonstrates that this is sufficient to invoke the jurisdiction of this honorable Court.

## CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...

Section 50-1324, Tennessee Code Annotated (1977):

> An individual shall be disqualified for benefits:
>
> A. If the commissioner finds that he has left his most recent work voluntarily without good cause connected with his work, such disqualifications shall be for the duration of the ensuing period of unemployment and until he has secured subsequent employment covered by an unemployment compensation law of this state, or another state, or of the United States, and earned thereby five (5) times his weekly benefit amount. No disqualification shall be made hereunder, however, if such individual presents evidence supported by competent medical proof that he was forced to leave his most recent work because he was sick or disabled and notified his employer of that fact as soon as it was reasonably practical to do so, and returned to that employer and offered himself for work as soon as he was again able to work, and to perform his former duties. Pregnancy shall be considered the same way as any other illness or disability within the meaning of this subsection. At the expiration of such period, if said individual is not reemployed, such individual shall be entitled to unemployment benefits hereunder, if otherwise eligible under the provisions of this chapter. Neither shall this disqualification apply to an individual who has left work in good faith to join the armed forces of the United States.
>
> B. ****

## STATEMENT OF THE CASE

The Appellant, Brenda J. De Priest, a resident of Nashville, Tennessee, began work in 1977 as a secretary for the Tennessee Department of Human Services, an agency of the State of Tennessee. For over five years prior to that time, she had been a member of the Worldwide Church of God. A fundamental belief of said church is that its members are required to observe the Feast of Tabernacles and the Last Great Day (an eight day period of religious observance occuring in the fall of each year) by assembling at one of

the regional sites designated by the church and by attending religious services each day. During that time Mrs. De Priest had always faithfully observed church holy days by refraining from secular labor and activities and by attending religious services.

In the fall of 1978, the period of the Feast of Tabernacles and the Last Great Day was observed from sunset on October 15, 1978 to sunset on October 23, 1978, inclusive. The two nearest designated locations for Mrs. De Priest to attend said religious observances were Lake of the Ozarks, Missouri, and Savannah, Georgia, and Mrs. De Priest attended at Lake of the Ozarks, Missouri.

In September, 1978, prior to the beginning of the Feast of Tabernacles, Mrs. De Priest made a written request to the Tennessee Department of Human Services for leave without pay (special leave) to observe said holy days. Such special leave was provided for by regulation (Rule 1120-3-3-.13-(2) of the Rules and Regulations of the State of Tennessee[2]). Mrs. De Priest had intended to use regular leave days for the purpose of attending the foregoing mentioned religious observance, but most of said leave time was used up due to unanticipated family and personal illness.

Approximately one week after Mrs. De Priest's request for special leave to observe her holy days, her superiors informed her that the request was denied. As is indicated by the quote in the paragraph below from the letter dismissing her from employment, Mrs. De Priest thoroughly explained why this leave was needed, but to no avail as the Tennessee Department of Human Services stayed with its decision to deny her leave request. Mrs. De Priest had never previously been informed that her absences for sickness were excessive nor had she ever been reprimanded in any way for the same. No offer was made of any attempted accommodation for her request. Even though Mrs. De Priest was away from her job during that time to attend her holy days, no hardship to the

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2 Rule 1120-3-3-.13-(2) reads as follows: "Religious Holidays--Excused absence in the form of annual leave or leave without pay may be granted for religious holidays when in the determination of the appointing authority or his designated representative, the employee can reasonably be spared."

Tennessee Department of Human Services was ever shown to have resulted from her absence.

Because of the required nature of her religious observance, Mrs. De Priest took off from work to attend the Feast of Tabernacles and the Last Great Day. Upon her return, she found a letter from Commissioner Horace Bass of the Tennessee Department of Human Services dismissing her from employment. In part that letter stated:

> "This action is being taken as part of management's decision to deny your request for special leave [leave without pay] in order for you to observe certain holy days of your religion. You ignored this decision and have been on unauthorized leave since October 13."

On October 25, 1978, Mrs. De Priest applied for unemployment compensation benefits. This request was denied by the Tennessee Department of Employment Security based on Tennessee Code Annotated, Section 50-1324(A). The reason stated was that Mrs. De Priest "left her most recent work voluntarily without good cause connected with her work...". Mrs. De Priest exhausted her administrative remedies by appealing the denial of unemployment compensation through the administrative proceedings provided by Tennessee statutes.

After administrative denial against her, Mrs. De Priest took her case successively to the Chancery Court by Petition for Certiorari, to the Tennessee Court of Appeals[3] and to the Supreme Court of the State of Tennessee by an application for leave to appeal. The constitutionality of Tennessee Code Annotated, Section 50-1324(A), as applied, was raised at each level as being in violation of the First Amendment religion clauses as applicable to the states under the Fourteenth Amendment.

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3 Appeal was at first filed directly from the Chancery Court to the Tennessee Supreme Court but was transferred to the Court of Appeals, Middle Section of Tennessee, under the Uniform Administrative Procedures Act, Tennessee Code Annotated, Section 4-5-118.

## THE QUESTIONS ARE SUBSTANTIAL

The essence of this case is whether Tennessee Code Annotated, Section 50-1324(A) violates the religion clauses of the First Amendment of the United States Constitution where, as here, it is applied to sanction the denial of unemployment compensation benefits where an applicant has lost her job as a result of observing religious holy days.

The holding in the administrative proceeding and in the courts below would result in state agencies being able to fire employees with impunity without any obligation to pay unemployment compensation, even though the employee was fired only because the state refused to accommodate his religious holy days.

This case is not novel. The same basic issue has been treated once by this court in the landmark case of Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. E. 2d 965 (1963). A similar case is presently before this court in Thomas v. Review Board of the Indiana Employment Security Division, No. 79-952, in which the court has already heard oral argument on October 7, 1980. In that case a Jehovah's Witness was transferred by his employer to a department manufacturing parts for tanks. When the employer refused to accommodate Thomas' religious objections by transferring him to a non-arms manufacturing department, he quit and filed for umemployment compensation. The court must decide whether the state may constitutionally refuse to grant unemployment compensation where Thomas had to choose between either quitting his job or violating his religion by working on a job manufacturing military armaments.

It was also the same basic issue as was before the California Supreme Court in the case of Hildebrand v. Unemployment Insurance Appeals Board, 19 C. 3d 765, 140 Cal. Rptr. 151, 566 P. 2d 1297 (California Supreme Ct., 1977) cert. denied, 434 U.S. 1065. The California Court distinquished Sherbert by holding that Hildebrand had not been forced to choose between her religious principles and her financial needs, as a condition for receipt of unemployment compensation, and Mrs. Sherbert had. Rather, the Court held that Mrs. Hildebrand had voluntarily assumed employment knowing it conflicted with her religious principles and thereafter voluntarily quit.

This case, the Hildebrand case, and the Thomas case, appear to be in the minority of those reported in the National Reporter System. In Tary v. State, 119 N.E. 2d 56 (1954), the Ohio Supreme Court determined the employee had good cause to refuse employment where Saturday work was involved as this would have violated her religious beliefs; therefore, unemployment compensation benefits should be awarded. This appears to be the reverse of the Ohio Supreme Court's earlier decision in the Kut v. Albers Super Markets, Inc., 66 N.E. 2d 643 (1946), where it ruled that refusing to work on Saturday disqualified an employee from receiving benefits. This court dismissed an appeal in the Kut case at 329 U.S. 669, 67 S. Ct. 86 (1946), and denied a rehearing at 329 U.S. 827, 67 S. Ct. 186 (1946). The Ohio Court of Common Pleas for Summit County in Wallace v. B.U.C., 160 N.E. 2d 580 (1959), found that where Sunday work violates one's religious principles, that refusal of employment is with good cause and the person is eligible for unemployment compensation benefits.

In Syrek v. App. Bd., Cal. S. Ct. Reptr. 97, 354 P. 2d 625 (1960), the California Supreme Court ruled that an employee may refuse a job where he had a conscientious objection to taking the loyalty oath required for the job and such an employee would still qualify for unemployment compensation benefits. In Lincoln v. True, 408 F. Sup. 22 (1975) the U.S. District Court for the Western District of Kentucky found that an employee that left employment rather than handle tobacco, which violated her religious beliefs, had good cause for her actions and was eligible to receive unemployment compensation benefits.

In Swenson v. Mich. Employment Security Comm., 65 N.W. 2d 709 (1954), the Michigan Supreme Court ruled that plaintiffs were not ineligible for unemployment compensation benefits because they would not accept work on Friday nights or Saturdays for religious reasons. The North Carolina Supreme Court in In re Miller, 91 S.E. 2d 241 (1959) found that a woman was not ineligible for unemployment compensation benefits where for religious reasons she left her employment rather than work on Friday nights and refused other employment requiring Friday night and Saturday work. In St. Germain v. Adams, 377 A. 2d 620 (1977) the New Hampshire Supreme Court held an employee eligible for benefits where she left employment because of having to work on Sundays contrary to her religious beliefs.

The issue of how religious or moral scruples affect eligibility for unemployment compensation benefits has been considered in many administrative and trial court proceedings with mixed results. A list summarizing many of these cases, taken from the Unemployment Insurance Reporter published by Commerce Clearing House is set forth in the Appendix at p. 21a.

The same issue arises not infrequently but is generally not pursued beyond the administrative level due to the cost of an appeal and the poverty of the person that really needs the assistance unemployment benefits provide. A decision on this case will clarify the eligibility of many religious observers, other than sabbath observers, who are terminated or denied employment due to religious conflicts.

In the Sherbert case, the court held that a state must have a compelling state interest before being permitted to deny unemployment compensation where an employee refused to accept employment which would require her to work on her weekly holy day or day of rest (Saturday).

The state below attempted to distinguish Sherbert on two grounds: (1) that Mrs. Sherbert's religious belief involved weekly holy days or days of rest, whereas Mrs. De Priest's involves annual holy days or days of rest, and (2) that benefits were denied to Mrs. Sherbert because of her refusal to accept a new job which would require her to work on her holy days or days of rest whereas Mrs. De Priest was denied benefits as a result of being terminated from a past job for refusal to work on her holy days or days of rest.

In the Sherbert case, this court held that, before benefits could be denied to Mrs. Sherbert, the state must show a compelling state interest. In Mrs. De Priest's case, even though the employer was the State of Tennessee and the administrator of the unemployment compensation was also the State of Tennessee, no "compelling state interest" was ever required or demonstrated for refusing to pay such benefits.

As to the first ground for distinguishing Sherbert, the First Amendment should protect the worker's right to worship at one time as well as another, assuming it is a legitimately held religious belief as to the time period involved. In this case, nothing was presented into evidence questioning Mrs. De Priest's sincerity. Therefore, this first difference between Sherbert and the present case would appear meaningless.

The second ground is no more persuasive. Under the application of Tennessee Code Annotated, Section 50-1324(A), made by the Tennessee Department of Employment Security and the Tennessee courts, Mrs. De Priest is placed in the position of either violating a cardinal provision of her religious beliefs by working on the holy days and therefore not needing unemployment compensation benefits because she was not fired or refusing to violate those religious beliefs, being fired, and denied unemployment compensation benefits.

In Sherbert v. Verner, infra page 6, 374 U.S. at 406, this Court said that:

> "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."

A few pages earlier in the Sherbert case, 374 U.S. at 404, this Court spelled this out in more detail as regards the keeping of holy days as follows:

> "For if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling [ state court ] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept [ keep ] * work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday [ Feast of Tabernacles ] * worship."

Thus it appears that exactly the same form of pressure existed on Mrs. De Priest in this case as on Mrs. Sherbert in the Sherbert case and it should make no difference if the employer(s) for which the employee refused to work is (are) future employer(s) as in the Sherbert case, or a past employer, as in Mrs. De Priest's present situation.

Following the reasoning in the Sherbert case shows that a substantial burden has been placed on Mrs. De Priest in the exercise of her religion.

The one issue that the Court did mention in the Sherbert case, starting at 374 U.S. 406, might excuse a denial of benefits was compelling state interest. The State of Tennessee has made no showing to date that such an interest exists in the case presently before this Court.

In addition to Tennessee's application of Tennessee Code Annotated, Section 50-1324(A), being a burden on the free

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* Equivalent facts of this case inserted for Court to more easily see the comparison.

exercise of religion, it also constitutes an establishment of religion in accordance with the guidelines laid down by this Court in Everson v. Board of Education of Ewing Township, 330 U. S. 1, 91 L. Ed. 711, 67 S. Ct. 904 (1947), as follows:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance." 330 U.S. 1 at 15,16.

The denial of unemployment compensation benefits to Mrs. De Priest under the authority of Tennessee Code Annotated, Section 50-1324(A), because she refused to work on the holy days of her religion but chose rather to attend church services constitutes an "influence" over her to stay away from church services against her will and constitutes punishment for attending church.

The State of Tennessee goes further in this discrimination by providing for the majority of religions in our society by setting as holidays such days as Christmas, Good Friday, New Years (Gregorian or Catholic calendar) and others. In fact, just this past year, 1979, in accordance with longstanding practice, the State gave employees off December 24, 25, and 26 with pay. Again, in 1980, state employees have been notified that they will receive off with pay December 24, 25, and 26. Mrs. De Priest does not observe these days and would be willing to work then, but she was not given this option. She is not attacking the use of legal holidays to take care of the needs of the majority, but ample provision should be made for the minority religions of our society so that the State does not act so as to "establish" the majority religions.

Why then should appellant not be protected in her First Amendment right to attend religious services without being denied social welfare benefits to which she would otherwise be entitled? Why should states be allowed by the designation of holidays and other similar matters to favor members of majority religions and yet make no provision whatsoever for minority religions?

Tennessee has imposed Tennessee Code Annotated, Section 50-1324(A), in such a way as to deny unemployment compensation benefits to Mrs. De Priest when she was very much in need of funds to support herself and her daughter. The absence of any compelling state interest in so doing only adds substantially to the First Amendment claim.

## CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Ralph K. Helge
Counsel of Record
Rader, Helge & Gerson
Union Bank Building
Suite 706
201 South Lake Avenue
Pasadena, California 91101
213/577-5380

Harvel M. Rogers Jr.
151 Athens Way
Metro Center
Nashville, Tennessee 37185
615/244-7672

December 11, 1980
Date

Counsel for Appellant

# APPENDICES

JUDGMENT ENTERED THIS
JUN 27 1980
DA...
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CLERK
COURT OF APPEALS

BRENDA J. DePRIEST

Petitioner-Appellant,

VS.

COMMISSIONER ROBERT J. BIBLE, TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY and COMMISSIONER MOSE PLEASURE, JR., TENNESSEE DEPARTMENT OF HUMAN SERVICES,

Defendants-Appellees

DAVIDSON EQUITY

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM PART I, CHANCERY COURT, DAVIDSON COUNTY, TENNESSEE

HONORABLE BEN H. CANTRELL, CHANCELLOR

FILED: JUN 27 1980

HARVEL M. ROGERS, JR.
151 Athens Way, Metro Center
Nashville, Tennessee 37228
ATTORNEY FOR PETITIONER-APPELLANT

HONORABLE WILLIAM LEECH, JR., STATE ATTORNEY GENERAL
DONALD S. CAULKINS, DEPUTY ATTORNEY GENERAL, STATE OF TENNESSEE
450 James Robertson Parkway, Nashville, Tennessee 37219

SAM J. MCALLESTER, JR., and RANDALL P.B. HARRIS,
Office of the Chief Counsel
Tennessee Department of Employment Security
525 Cordell Hull Building, Nashville, Tennessee 37219

LOUISE R. FONTECCHIO
Associate General Counsel
Tennessee Department of Human Services
111-19 Seventh Avenue North, Nashville, Tennessee 37203

ATTORNEYS FOR DEFENDANTS-APPELLEES

THOS. A. SHRIVER
PRESIDING JUDGE

AFFIRMED.

| | | |
|---|---|---|
| BRENDA J. DePRIEST,<br><br>Petitioner-Appellant | ) | |
| VS. | ) | DAVIDSON EQUITY |
| COMMISSIONER ROBERT J. BIBLE, TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY and COMMISSIONER MOSE PLEASURE, JR., TENNESSEE DEPARTMENT OF HUMAN SERVICES,<br><br>Defendants-Appellees | ) | |

## O P I N I O N

- The Case -

This is an appeal from the action of the Tennessee Department of Employment Security in denying unemployment compensation benefits to petitioner Brenda J. DePriest. Petitioner was employed by the Tennessee Department of Human Services as a secretary, in which capacity she served for approximately ten months when she applied for leave to keep certain holy days of her religion, the Feast of Tabernacles and the Last Great Day, a total of eight days. This request was denied by her employer and, thereafter, her employment was terminated in October, 1978 after she left her job without permission and was absent during the above mentioned holy days. Thereafter, benefits were denied petitioner by the Tennessee Department of Employment Security on the ground that she voluntarily quit her latest employment. She appealed and a hearing was held before an Appeals Referee on December 20, 1978, and, on December 29, 1978, the Appeals Referee sustained the decision of the Department in denying the petitioner unemployment benefits.

On January 5, 1978, Mrs. DePriest appealed to the Board of Review of the Department of Employment Security and a hearing was had on March 22, 1979 which resulted in an affirmance of the decision of the Appeals Referee.

On May 1, 1979, Mrs. DePriest filed her Petition for Certiorari in the Chancery Court, Part I, of Davidson County and the case was heard on June 29, 1979 by Chancellor Ben H. Cantrell and, thereafter, on October 16, 1979, the Chancellor filed his Memorandum Opinion in which he sustained the action of the Department in denying petitioner unemployment compensation benefits.

- The Chancellor's Memorandum -

The Chancellor's Memorandum Opinion is as follows:

"MEMORANDUM

At issue in this case is the right of a former state employee to unemployment compensation where she has been found to have voluntarily quit as a result of being absent from work to attend religious observances of her religion.

The facts are not seriously in dispute. Mrs. DePriest was an employee of the Department of Human Services and a member of the World Wide Church of God. In 1978 she had taken all of her annual leave days and requested 12 days of additional leave to observe the Feast of Tabernacles and the Last Great Day, which are holy days of her religion and which practitioners of that faith feel a moral compulsion to observe. Her request was denied by her department; when Mrs. De Priest did not report to work on these days she was terminated by the Commissioner.

The appeals referee found, essentially, these facts and concluded that Mrs. DePriest voluntarily left her job when work was available for her. The department's decision to disallow the claim was affirmed. The Board of Review adopted the findings and conclusions of the appeals tribunal and denied the claim.

Section 50-1324(a) denies a claim for benefits where an employee leaves his work 'voluntarily without good cause connected with his work...' Mrs. DePriest contends that under these circumstances the application

of that law to her violates the First and Fourteenth Amendments to the United States Constituion, and Article I, Section 3, and Article II, Section 15, of the Constitution of Tennessee. The Court disagrees with her contention and holds that the decision of the Board of Review should be affirmed.

The petitioner cites Sherbert v. Verner, 374 U.S. 398, 10 L.Ed. 2d 965, 83 S. Ct. 1790 (1963) as controlling on the federal constitutional question. That case held that an applicant could not be denied benefits for refusing to accept work which required her to work on Saturday, her Sabbath day. To do so would restrict the free exercise of her religion which is proscribed by the United States Constitution. Parenthetically, this Court observes that the same result might flow from the provisions of Article I, Section 3, and Article II, Section 15, of the Tennessee Constitution. Article II, Section 15 provides: 'No person shall in time of peace be required to perform any service to the public on any day set aside by his religion as a day of rest.' However, that is not the case here. The facts of this case do not present the question of Sabbath observance on a day set aside as a day of rest, but concern other holy days of her religion. Under ordinary circumstances these can be planned for and worked out within the liberal annual leave provisions of state government. Therefore, this case does not come within the rule of Sherbert v. Verner, and Article II, Section 15 of the Tennessee Constitution does not compel a different result.

The Supreme Court of California has recognized this distinction between an employee forced to choose between her religious principles and her financial needs as a condition to receipt of unemployment benefits, and an employee who voluntarily quits when the conflict becomes unavoidable. Hilderbrand v. Unemployment Insurance Appeals Board, 566 P. 2d 1297 (Cal. 1977). In doing so, the Court noted that where the employee accepted a job with full knowledge of the requirement of Saturday work and later refused to work on Saturday, the employee had voluntarily quit without good cause and was properly denied unemployment benefits. This is such a case.

The decision of the Board of Review should be affirmed and the petition dismissed at the cost of the petitioner. Mr. Harris will draw the order.

/s/ Ben H. Cantrell
Chancellor

October 15, 1979."

The foregoing Opinion was implemented by a decree dated October 19, 1979.

- The Issues -

The appellant states the issues as being:

(1) Whether or not the action of the State in denying petitioner unemployment compensation is violative of the First and Fourteenth Amendments of the United States Constitution.

(2) Whether or not the action of the State is in violation of Article I, Section 3 of the Tennessee Constitution, which provides that all men have a natural and indefeasible right to worship God according to the dictates of their conscience and that no authority can control or interfere with that right.

(3) Whether or not the action of the State violates Article II, Section 15 of the Constitution of Tennesee which provides that no person shall in time of peace be required to perform any service to the public on any day set apart by his religion as a day of rest.

(4) Whether or not the day of rest referred to in the Constitution applies only to the Sabbath, or Sunday.

(5) Whether under T.C.A. § 50-1324 a person whose employment is terminated because she refuses to work on holy days of her religion may be deemed in the words of the statute to have "left his [her] most recent work voluntarily without good cause connected with his [her] work."

- Our Conclusions -

The record shows that Mrs. DePriest, after her request for leave to keep certain holy days of her religion, voluntarily stayed away from work although, apparently, she did not thereby intend to resign from her job. However, she was terminated from her employment in October, 1978 because of her absence from work.

It appears that Mrs. DePriest had been a member of the World Wide Church of God for six years and had kept these days of rest recognized by her religion during that time. It also appears that the Tennessee Department of Employment Security denied unemployment compensation benefits on the basis of Mrs.

DePriest voluntarily leaving her most recent work without good cause connected with her work.

Counsel for appellant states in his brief and argument that Mrs. DePriest's position centers on the unconstitutionality of denying her social welfare benefits because she chose to be a member of a particular religious group and to follow the beliefs of that group in keeping certain days of rest, or holy days as she generally refers to them.

It is to be noted that, generally, when unemployment compensation benefit claimants appear without a lack of work separation notice from their employer, they are asked to make a statement regarding their separation from work at the time of the filing of the initial claim with the Tennessee Department of Employment Security. Such was the procedure in the instant case and, by her own admission, she stated at the time of filing of her claim: "I requested 12 day special leave to observe certain holy days obligatory to my religion." She then went on to say: "My request for special leave was not granted... so I was absent without leave...." [Board of Review Exhibit #2] However, in her testimony before the Department of Employment Security Appeals Referee she stated:

> "In September I requested special leave to keep the Feast of Tabernacles and the Last Great Day, a total of eight days. A week later I was notified that this was denied. I went ahead an observed this thing...And when I got back, I had a letter of termination in the mail."

This letter, apparently, was written ten days after the appellant had last appeared for work and as is observed by counsel for appellees, apparently Mrs. DePriest made no effort to actually inform her employer prior to leaving that she would be ignoring the decision not to grant her request for additional

special leave and that she would absent herself from work by leaving the State for an extended period of time.

It is to be noted that Commissioner Bass informed her that her irregular attendance record had worked a hardship on staff members and was a determining factor in making his decision to terminate her employment, and he urged her in future employment to advise prospective employers of her religious commitment which would necessitate an unusually large amount of absenteeism.

The appellant's statements corroborate the fact that in no way did she initiate any understanding with her employer at the time she was hired concerning the requirements of her religion that she would be absent from work for an extended period of time to observe days of rest.

In the hearing before the Appeals Referee, the following occurred:

> "REFEREE: Well, did you have any understanding with her or anybody else at the time you were initially employed, about taking off on holy days?
>
> CLAIMANT [Petitioner] No sir. When I was first hired by Human Services, I was aware of the, you know, the annual days you get and the sick days, and that [I] could request special leave, and I just didn't think it was necessary. I thought I would have the days. I didn't know, you know, what was going to happen." [Board of Review, Exhibit #15]

As is pointed out by counsel for appellees in their brief and argument, appellant, prior to requesting her employer to grant additional special leave to attend these "days of rest," voluntarily chose to exercise her right as a state employee regarding annual and sick leave and used up at her own choice all of her annual and sick leave days accumulated during her tenure with the State.

The petitioner testified as follows:

"REFEREE: ...Why didn't you use your annual leave for this purpose?

CLAIMANT: I didn't have any annual leave because it had been used up because of sickness, and also my mother-in-law died in December and I had to take three days when I was working in the state office because...

REFEREE: Well, for sickness - of course you can use sick leave...

CLAIMANT: Yes. ... So all the days were used up. So, I asked for special leave." [Board of Review, Exhibits #14 & 15]

It is to be observed at this point that, actually, petitioner was not employed by the State in December. Her ten months of service were from January to October, 1978.

Apparently, the request of petitioner for special leave was not the first such request. Prior to requesting additional special leave for the "days of rest," appellant had already requested and had been granted three other special leave days as brought out by her supervisor in the testimony before the Referee.

Ms. Schmidt stated:

"Mrs. DePriest requested the leave as already stated. However, as she also stated, she had used quite a bit of leave prior to that time. She had used all of her annual leave and all of her sick leave, and in addition to that, had gone into three plus days into special leave..."

It should be noted that her use of sick leave was apparently not because of her own illness but was because of the illness of her daughter and/or her mother-in-law.

Ir appears that Civil Service Regulation 1120-2-2-.13 entitled "Tenure and Separations," in pertinent part, provides:

"...Any employee who is absent from duty for more than three consecutive business days without notice to his appointing authority or superior officer of the

reason for such absence and without securing permission to be on leave, or who fails to report for duty or to the immediate supervisor or the appointing authority within two business days after the expiration of any authorized leave of absence, shall be considered as having resigned not in good standing, provided there were not existent circumstances over which he had no control."

It is to be noted that under T.C.A. § 50-1325(I), it is provided:

"...In any judicial proceeding under this section, the findings of the Board of Review as to the facts, if there be any evidence to support the same, shall be conclusive and the jurisdiction of said court shall be confined to questions of law..."

In Bailey v. Tenn. Dept. Emp. Security, 212 Tenn. 422 (429-430), 370 S.W. 2d 492 (1963), it was said:

"...The statute, T.C.A. Sec. 50-1325(I), makes the decision of the Board of Review as to the facts and inferences to be drawn from the facts the equivalent of a jury verdict... If, from the facts in the record, reasonable minds could differe as to the cause of the unemployment, then the decision of the Board is final..."

Also see Duke v. Scott, 216 Tenn. 391 (397), 392 S.W. 2d 809 (1965), where it is said that the Supreme Court, as well as the Chancellor, were bound by the finding where there was material evidence to support it. To like effect is the holding in Griggs v. Sands, 526 S.W. 2d 441 (443) (Tenn. 1975).

We agree with the contention of appellees that in the case at bar there is both warrant in the record and a reasonable basis in law to support the Board of Review's interpretation of the disqualification statute denying appellant's claim for benefits within the context of the specific circumstances of petitioner's separation from work.

In T.C.A. §50-1324, concerning disqualification for benefits, it is provided an individual can be disqualified for benefits:

"A. If the commissioner finds that he has left his most recent work voluntarily without good cause connected with his work.... " [Emphasis supplied]

In Wallace v. Stewart, 559 S.W. 2d 647 (649) (Tenn. 1977), the Supreme Court, speaking through Mr. Justice Fones, held that excessive absenteeism can be a basis for denial of unemployment benefits. The Court stated:

> "...No aspect of contract of employment is more basic than the right of the employer to expect employees will appear for work on the day and at the hour agreed upon."

On the Commissioner's appeal in Thach v. Scott, 410 S.W. 2d 173 (176) (Tenn. 1966), the Court was of the opinion that the Chancellor was in error in reversing the action of the Board of Review and the Court, speaking through Mr. Justice Harbison, stated:

> "...Unemployment compensation is not necessarily health insurance. In several states 'good cause' for quitting must be attributable to the employer or arise in connection with the work before the employee is said to be taken out of the category of having voluntarily quit. The Tennessee statute contains such a limitation, and the individual is disqualified if he leaves voluntarily without good cause connected with his work under the express terms of T.C.A. § 50-1324, subd. A...."

In Aladdin Industries, Inc. v. Scott, 219 Tenn. 71 (78), 407 S.W. 2d 161 (1966), in reversing a decree of the Chancellor who affirmed the decision of the Board of Review to award benefits to an employee who claimed it was not a suitable offer of work and refused to accept a transfer, the Court said:

> "...To uphold the decision of the Board of Review would be placing in the hands of the employee the right to determine when and under what conditions she would work. Such a holding would unduly restrict the employer and could conceivably, under certain circumstances, make it almost impossible to carry on a business during certain hours...."

Counsel for appellant relies heavily on the case of Sherbert v. Verner, 374 U.S. 398, 10 L.Ed 2d 965, 83 S.Ct. 1790 (1963(, which involves the denial by the State of South Carolina of unemployment compensation benefits to Mrs. Sherbert

who had been discharged from employment for refusing to work on Saturday, she being a member of the Seventh Day Adventist Church. South Carolina denied unemployment compensation benefits on the basis that this refusal to accept work, even under these circumstances, violated the requirement of the South Carolina statute which is somewhat similar to the Tennessee statutes in that it provides that to be eligible for benefits a claimant must be able to work and available for work and, further, that claimant is ineligible for benefits where he has failed without good cause to accept available suitable work when offered.

While Sherbert v. Verner may plausibly be insisted upon as authority for petitioner's position in the case at bar, we think there are several distinguishing features which render the Sherbert case inapplicable as binding authority in the case at bar.

In Sherbert, the Court, speaking through Mr. Justice Brennen, expressly held:

> "...Nor do we, by our decision today, declare the existence of a constitutional right to unemloyment benefits on the part of all persons whose religious convictions are the cause of their unemployment... Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest...."

As is pointed out by counsel for appellees, Mrs. Sherbert's situation was different from that of petitioner DePriest in that the United States Supreme Court reversed in Sherbert not because the denial of unemployment benefits under the circumstances of her own creation surrounding her separation from her last employment, but because she was denied benefits in South Carolina because she would not accept new employment that would require her to be available for Saturday

work, she being a Seventh Day Adventist, and South Carolina did not find that Mrs. Sherbert was separated from her last job but voluntarily left without a work connected cause. It did find that her own restriction upon her availability for Saturday work brought her within the provision of their law disallowing benefits to workers who fail to accept suitable work when offered.

In the case at bar, appellant's disqualification for benefits was based upon the circumstances of her own creation that surrounded her separation from work she had already accepted, and it did not force her to abandon one of the precepts of her religion as a pre-condition to eligibility.

It is to be noted that appellant's disqualification does not derive solely from the practice of her religion. Mrs. DePriest had already chosen to accept employment at a time when she was aware of the provisions for annual, sick and special leave, and she did not seek any understanding with her employer at the time of her employment regarding her need for leave on special days of rest, and, furthermore she chose to use up all of her accumulated annual and sick leave as well as three additional days of special leave before she decided unilaterally to leave her job behind in order to attend her days of rest in another state and she left without any notification to her employer that she would be absent.

The Supreme Court of the United States has recently denied certiorari and let stand a California Supreme Court decision denying unemployment compensation benefits under an equivalent statute to that involved here.

In Hildebrand v. Unemployment Ins. Appeals Bd., 566 P. 2d 1297 (1299), cert. denied 434 U.S. 1068 (1978), the Board's

denial of benefits was upheld on the ground that Mrs. Hildebrand left her last employment voluntarily without good cause and her former employer had replaced her because she failed to report for Saturday work due to her religious beliefs. Justice Richardson cited Trans World Airlines v. Hardison, 432 U.S. 63, 53 L.Ed 2d 113 (120), 96 S. Ct. 2264 (1977), and distinguished Sherbert as follows:

> ..."Sherbert is distinguishable from the present case. In Sherbert the high court examined the circumstances under which a prospective employee refused without good cause 'to accept available suitable work.' Although California imposes a similar 'suitable work' requirement upon claimants (§1257), the legality of that statute is not before us. Instead, measuring the constitutionality of Section 1256, we must determine whether plaintiff, having initially accepted employment, thereafter left work 'voluntarily without good cause.' The public policy underlying section 1256 has been recognized both statutorily and judicially. By denying unemployment benefits to one who has voluntarily terminated employment without good cause, the state promotes a valid purpose in assuring that unemployment benefits are reserved 'for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum.' (§100; see Zorrero v. Unemployment Ins. Appeals Bd., (1975) 47 Cal. App. 2d 434, 439, 120 Cal. Rptr. 255, 258)"

For reasons indicated, the judgment of the Chancellor is affirmed.

AFFIRMED.

Thos. A. Shriver

THOS. A. SHRIVER
PRESIDING JUDGE

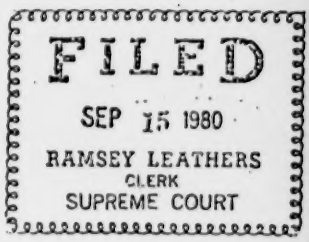
TODD, J., CONCURS

McCANLESS, S.J., CONCURS

IN THE SUPREME COURT OF TENNESSEE

AT

NASHVILLE

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|---|---|---|
| BRENDA J. DE PRIEST<br><br>Petitioner-Appellant | ) | |
| VS. | ) | DAVIDSON EQUITY |
| COMMISSIONER ROBERT J. BIBLE, TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY and COMMISSIONER MOSE PLEASURE, JR., TENNESSEE DEPARTMENT OF HUMAN SERVICES<br><br>Defendants-Appellees | ) | |

O R D E R

Upon consideration of the application for permission to appeal and the answer thereto, the briefs of counsel and the entire record, the Court is of the opinion that the application should be denied.

PER CURIAM

IN THE HONORABLE CHANCERY COURT, PART I, OF DAVIDSON COUNTY, TENNESSEE, AT NASHVILLE

BRENDA J. DE PRIEST,

Petitioner,

vs.

No. 79-735-1

COMMISSIONER ROBERT J. BIBLE, TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY, and COMMISSIONER MOSE PLEASURE, JR., TENNESSEE DEPARTMENT OF HUMAN SERVICES,

Defendants.

FINAL DECREE DISMISSING PETITION FOR CERTIORARI

This cause came on to be heard on the 29th day of June, 1979, at 2:30 p.m. before the Honorable Ben H. Cantrell, Chancellor, Part I, Seventh Chancery Division, upon the Petition for Certiorari and the attendant Writ thereto, answers of the respective Defendants, the certified transcript of the complete record of all administrative proceedings had before the Tennessee Department of Employment Security regarding the Petitioner's claim for unemployment compensation benefits, and oral argument of counsel for all parties, and upon consideration of same this Court holds that the decision of the Department of Employment Security Board of Review should be affirmed for the reasons as set forth in the Chancellor's Memorandum of October 15, 1979, which is hereby incorporated by reference as if copied in full herein, and it is therefore,

ORDERED, ADJUDGED and DECREED

That the decision of the Board of Review should be, and hereby is, affirmed in all respects, and that the Petition for Certiorari in this cause, together with the attendant Writ thereto, should be, and hereby are, forthwith dismissed with costs taxed to the Petitioner, for which let execution issue if necessary.

CHANCELLOR

Filed October 19, 1979

APPROVED FOR ENTRY:

Office of the Chief Counsel
Tennessee Department of Employment Security
525 Cordell Hull Building
Nashville, Tennessee 37219

18th October 79

Randall B. Hoover

TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY
DECISION OF THE BOARD OF REVIEW

79-BR-803
78-AT-8386

Office # 300
BYE 10 20 79

CLAIMANT

Brenda J. Depriest
1315 McChesney
Nashville, Tennessee 37216

SS # 411 88 1078

EMPLOYER

State of Tennessee
Dept. of Human Services
1720 West End Avenue
Nashville, Tennessee 37203
ATTN: Elise Oliver

Employer # 650 351
Docket # 79-1074

This claimant filed an initial claim for unemployment compensation on October 25, 1978. On November 23, 1978, the Agency disallowed the claim under TCA 50-1324 A. Claimant filed an appeal to the Appeals Tribunal on December 6, 1978. The Appeals Referee conducted a hearing at Nashville, Tennessee, on December 20, 1978, at which time claimant appeared and testified. Claimant was represented by the Honorable Harvill Rogers, Attorney. Also present for the hearing was Rev. Charles Bailey and Mr. Jerry DePriest, claimant's husband. The employer was represented by Ms. Ellyn Schmidt, Technical Supervisor, and Ms. Elise Oliver, Regional Director. By decision dated December 29, 1978, the Appeals Tribunal affirmed the determination of the Agency, which disallowed the claim. From this decision the claimant filed an appeal to the Board of Review on January 5, 1979. The case was heard at Nashville, Tennessee, on March 22, 1979, at which time claimant appeared and testified. Claimant was represented by the Honorable Harville M. Rogers, Jr., Attorney. The employer was represented by Ms. Ellyn Schmidt, Technical Supervisor.

FINDINGS OF FACT: Based upon the entire record in this cause, the Board of Review finds the Appeals Tribunal correctly found the facts and applied the law. We hereby adopt the findings of fact and decision of the Appeals Tribunal, but the same need not be copied herein for the purpose of our decision. The additional testimony taken before the Board of Review does not warrant a reversal of the decision; therefore, the decision remains undisturbed.

DECISION: The decision of the Appeals Tribunal is in all things and matters affirmed.

mjs
April 12, 1979
Nashville, Tennessee

BOARD OF REVIEW

Dorothy E. Clawson, Chairperson
Frank D. Gibson
James E. Lanier

DES-801
(Rev. 3/1/74)

TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY
EMPLOYMENT COMPENSATION DIVISION
DECISION OF APPEALS TRIBUNAL

DOCKET # 78 AT 8386
OFFICE # 300
BYE 10 20 79

CLAIMANT
Brenda J. Depriest
1315 McChesney
Nashville, TN 37216
SS# 411 88 1078

EMPLOYER
State of Tennessee
Department of Human Service
1720 West End Avenue
Nashville, TN 37203
ATTN: Elise Oliver
E.R.#. 650 351

On October 25, 1978, claimant filed an initial claim for unemployment compensation. On November 23, 1978, the Agency found that claimant had voluntarily quit most recent work without good cause connected with the work as contemplated by Section 50-1324 A of the Tennessee Code. Claimant was therefore disqualified from receiving benefits for the duration of the ensuing period of unemployment and until claimant has earned five times the weekly benefit amount in subsequent employment. On December 6, 1978, claimant filed an appeal from the decision of the Agency to the Appeals Tribunal. After due notice to all interested parties, a hearing was conducted on this case at Nashville, Tennessee, on December 20, 1978, at which time claimant appeared and testified. Rev. Charles Bailey, claimant's minister, appeared for claimant and the Honorable Harvel Rogers, Attorney, represented claimant. Jerry Depriest, claimant's husand, appeared but did not testify. Representing the separating employer were Ellen Schmidt, Technical Supervisor, and Elise Oliver, Regional Director.

After carefully considering the testimony and the entire record in this case, the Appeals Tribunal makes the following

FINDINGS OF FACT: Claimant's most recent wage paying work prior to filing this claim was with State of Tennessee, Department of Human Service, Dayton, Tennessee, from January, 1978 to October 12, 1978, when claimant voluntarily left her employment. Claimant is a member of a church that has 13 holy days per year. Claimant requested 12 days special leave which is in the nature of leave without pay to observe the holy days that she felt she must observe. Claimant requested this special leave because she had exhausted all of her regular and annual sickleave in connection with personnel illness, illness of relatives and for various personal reasons. In addition, claimant had been granted three days of special leave for illness because of the fact that her leave had been exhausted. In view of the claimant's extended record of absences and the fact that she was needed on her job, her request for special leave was denied. Claimant elected to go ahead and take off anyway. As a result, she was terminated. At the time of her initial employment, there was no understanding with employer about the religious holidays because claimant thought she would be able to use her annual leave for this purpose.

COMMENT: After a review of the record and the testimony offered at the hearing, it is the opinion of the Appeals Tribunal that claimant must be considered as having voluntarily left her work when work was available for her. Furthermore, it would be unfair to impose various religious doctorine upon the employer when the services of the employee is needed.

DECISION: The determination of the Agency which disallowed this claim under Section 50-1324 A of the Code is in all things affirmed.

WD:sb:er
December 29, 1978

(over)

APPEALS TRIBUNAL
William Davenport

William Davenport
Acting Appeals Referee

Pursuant to the provisions of Sub-Section C of Section 50-1325 of the Code of Tennessee, any interested party has until January 8, 1979, to appeal from this decision by notifying the Board of Review, 300 Cordell Hull Building, Nashville, Tennessee 37219.

IN THE COURT OF APPEALS OF THE
STATE OF TENNESSEE

| | |
|---|---|
| BRENDA J. DE PRIEST,<br>PETITIONER-APPELLANT, | |
| VS. | CASE NO. 80-150-II |
| COMMISSIONER ROBERT J. BIBLE,<br>TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY AND<br>COMMISSIONER SAMMIE LYNN PUETT,<br>TENNESSEE DEPARTMENT OF HUMAN SERVICES,<br>DEFENDANTS-APPELLEES. | |

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Brenda J. De Priest, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgement of the Court of Appeals of the State of Tennessee, affirming the Chancery courts judgement, entered in this action on June 27, 1980. The Supreme Court of Tennessee denied the application for permission to appeal on September 15, 1980.

This appeal is taken pursuant to 28 U.S.C.§1257(2).

Harvel M. Rogers, Jr.
Counsel for Petitioner-Appellant
151 Athens Way
Nashville, Tennessee 37228

CERTIFICATE OF SERVICES

I, Harvel M. Rogers, Jr., affirm that copies of this Notice of Appeal were mailed to all required parties with sufficient postage for delivery. Copies were mailed to the following:

Mr. Donald S. Caulkins
Deputy Attorney General
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219

Mr. Randall P. B. Harris
Office of the Chief Counsel
Tennessee Department of
Employment Security
525 Cordell Hull Building
Nashville, Tennessee 37219

Ms. Louise R. Fontecchio
Associate General Counsel
Tennessee Department of Human Services
111-19 Seventh Avenue South
Nashville, Tennessee 37203

Clerk of the United States
Supreme Court
Supreme Court Building
Washington, D.C. 20543

on the 24th day of October, 1980.

Harvel M Rogers Jr.
Harvel M. Rogers, Jr.
Attorney for Petitioner-Appellant
151 Athens Way, Metro Center
Nashville, Tennessee 37228
615/244-7672

Affirmed to and subscribed before me this the 24th day of October, 1980.

Penny L Hunemaker
Notary Public

My commission expires on April 17, 1983.

ADMINISTRATIVE AND TRIAL COURT RULINGS
INVOLVING UNEMPLOYMENT
COMPENSATION BENEFITS AND RELIGION

All of the following cases were taken from the Unemployment Insurance Reporter, hereinafter U.I.R, published by Commerce Clearing House. They are listed by the state in which they arose and include decisions related to religion, morals, conscientious objection and other related matters.

1. Alabama: Associates of general tough moral fiber coupled with actual fights at the place of employment was grounds to quit due to serious hazard to claimant's morals. Other work opportunities existed. Eligible for benefits. App. Trib. Dec. No. 2419, Apr. 19, 1944 at P. 5097 of the U.I.R.

2. Arkansas: Refusal to work where beer was served was not good cause to refuse work. Ineligible for benefits. App. Ref. Dec. No. SO-47-1097 (Ark. A) SW-90-1, BSSUI, July 12, 1950 at P. 7101 of the U.I.R.

3. California: Refusing to work for all or portions of four days weekly is unavailable for work. Ineligible for benefits. App. Bd. Precedent Ben. Dec. P-B-17, Case 68-466, 6/18/68.

   Refusing to work in a union barber shop due to religious beliefs was proper where many of the barber shops in the area were nonunion. Eligible for benefits. App. Bd. Ben. Dec. 5602.

   Refusal to work in the Accounts Receivable Department of a wholesale liquor establishment was not good cause since the claimant was not engaged in the actual sale. Ineligible for benefits. App. Bd. Ben. Dec. 5788 at 8259-3 of the U.I.R.

Refusal to work where one is required to practice race discrimination was good cause. Eligible for benefits. App. Bd. Ben. Dec. 6708, 6/28/63 at 8259-3 of the U.I.R.

4. Connecticut: Refusing assembly work destined for military purposes on religious grounds was good cause. Eligible for benefits. Comm. Dec. No. 422-A-51 (Conn. Labor Bull., Nov., 1951) at 10,156-7 of the U.I.R.

   Refusing work due to high ethical standards leading to disagreement with district manager on sales method was good cause. Eligible for benefits. Comm. Dec. No. 22-E-40 (UCD Bull., Apr., 1940) at 10,156-7 of the U.I.R.

   Refusing work where one's high moral standard does not permit one to participate in conduct morally and ethically reprehensible according to one's standard is good cause. Here a radio news reporter objected to the deletion of a funeral home's name, that had not purchased advertising time, from a news story he had written. Eligible for benefits. Comm. Dec. No. 175-D-59 (Conn. B., VL-90-29, BSSUI), Nov. 5, 1959, at 10,156-7 of the U.I.R.

5. Georgia: Refusal to even investigate a job due to probability it might serve beer, held to be refusal of suitable work. Ineligible for benefits. Ref. Dec. No. 3240, 6-30-44 at 14,198 of the U.I.R.

6. Hawaii: Refusal to work where liquor is sold is good cause. Eligible for benefits. Ref. Dec. No. R-843, 12/27/56 at 14,692 of the U.I.R.

7. Indiana: Refusal to work in a place where employees gambled during working hours was with good cause. Eligible for benefits. Rev. Bd. Dec. S7-R-96, 10-16-57 at 17,148 of the U.I.R.

8. Iowa: Refusal to operate a machine used to produce plastic designs and symbols one considers idolatrous and contrary to one's religious beliefs good cause. Eligible for benefits. Curtis (Betty Marie) v. E.S.C. and Foam Molding Corp. of Iowa, Dist. Ct., Polk Co., 3/5/73 at 18,166 of the U.I.R.

9. Maryland: Refusal to work in a brewery was found not to be with good cause because claimant and his family drank in moderation. It was also pointed out that there is no assumption that intoxicants will be abusively used. The key, however, was claimant's not being a total abstainer. Ineligible for benefits. App. Ref. Dec. No. UCV-1348, Dec. 21, 1956 (BSSUI: Md. A, SW-90-19) at 23,114 of the U.I.R.

   Seventh Day Adventist refusing to work on Saturdays held available and eligible for benefits. Sisler v. Bd. of App., Md. Super. Ct., Baltimore City, July 16, 1972 at 4425 of the U.I.R.

10. Massachusetts: Refusal to work on work connected with the war effort was held to have withdrawn from the labor force for the duration of the war for any type of work connected with the war. Ineligible for benefits. Bd. of Rev. Dec. No. 6086 Mass. at 24,167 of the U.I.R.

    Refusal to work due to moral objection to the employer's ethics which could have been overcome by an increase in earnings was not good cause for leaving. Ineligible for benefits. Bd. of Rev. Dec. No. 39-A-12, Jan 21, 1939, at 24,202 of the U.I.R.

11. Michigan: Refusal of a Moslem woman who refused to work after dark because her religious beliefs prevented her from being on the public streets after dark was good cause. Eligible for benefits. Dawood v. U. S. Postal Service and MESC, Mich. Cir. Ct., Wayne Co., No 72-205-758-R-AE, 7/8/74 at 25,181 of the U.I.R.

12. Missouri: Refusal to accept work which required one to join a union was not good cause despite being based on religious convictions. Ineligible for benefits. App. Ref. Dec. No. A-2938-46, 8-27-46 at 28,104-5 of the U.I.R.

13. Montana: Refusal towork in a hotel cocktail lounge as a janitress was good cause for refusal even if done after work hours. Eligible for benefits. App. Dec. No. 199, 12-31-42 at 29,104 of the U.I.R.

14. New Hampshire: Refusal to work in the presence of objectionable patrons who, on many occasions, were under the influence of liquor was good cause. Eligible for benefits. App. Trib. Dec., Appeal No. 19-A-41, 3-7-41 at P. 32,147 of the U.I.R.

15. New Jersey: Refusal to work as a bartender for a person having moral scruples against the use of liquor held good cause. BR-6789 at P. 33,216 of the U.I.R.

    Refusal of work where a married woman would have had to ride home with a bartender employed at the same establishment that might involve her in some unwelcome gossip was good cause. BR-8749 at P. 33,216 of the U.I.R.

16. New York: Refusal to work on military implements of destruction is good cause especially when transferred from work not objectionable. App. Bd. Dec. 34,048-52 at P. 676 of the New York Vol. of the U.I.R.

    Refused to work as a funeral director because she believed certain duties performable only by licensed funeral directors were being performed by a caretaker was not good cause where a question of credibility was determined against the claimant. In re Witek, 33 App. Div. (2d) 949,306 N.Y.S. (2d) 776 (1970) at P. 749-14 of the New York Vol. of the U.I.R.

Refusal to work when an employee is requested by an employer to be a party to an illegal act is good cause. Ref. Dec. 525-1427-52R at P. 749-14 of the N. Y. Vol. of the U.I.R.

17. Ohio: Refusal to work serving liquor was with good cause. Brewster v. Bd. of Rev., Ct. of Com. Pleas, Ashland Cty., 3/29/63 at P. 38,147 of the U.I.R.

Refusal to work where liquor was sold was without good cause when she had previously worked at a place where high test beer--classified as intoxicating under Ohio law--was served. Youngkins v. Bd. of Rev., Ct. of Com. Pleas, Belmont Cty., 6-23/69 at P. 38,147 of the U.I.R.

Where Sunday work violates one's religious principles, refusal is with good cause. Ward v. Bd. of Rev., Ohio Ct. of Com. Pleas, Franklin Co., Dec. 11, 1959, at P. 4433 of the U.I.R. To the contrary where the facts did not show that claimant would consider working on Sunday a violation of the "law of God" or cause her to be expelled from her church. Lowery v. Admr., Ohio Ct. of Com. Pleas, Franklin Co., Feb. 23, 1955, at P. 4433 of the U.I.R.

Absenteeism during work hours so that the employee could celebrate the Sabbath in order to satisfy religious convictions is disqualifying. Lamb v. International Harvester, Ohio Ct. of Com. Pleas, Franklin Co., Jan. 10, 1974, at P. 4463 of the U.I.R.

Refusal to work on Sundays does not render claimant unavailable since she was available on all other days, and since no job requiring Sunday work had actually been offered her. Miller v. Bd. of Rev., Ohio Ct. of Com. Pleas, Clark Co., Dec. 23, 1970 at P. 4425 of the U.I.R.

Discharge held not for intentional wrongdoing where claimant refused Sunday shift because it conflicted with his religious beliefs. Ditterline v. Admr., Ohio Ct. of

Com. Pleas, Brown Co., Dec. 20, 1969, at P. 4479 of the U.I.R.

Man refusing to work Saturdays for religious reasons was entitled to unemployment compensation benefits. In Re Datish, Ohio Ct. of Com. Pleas, Trumbull Co., 4-27-77 at P. 38,953 of U.I.R. (Ohio rulings and decisions, transfer binder).

18. Pennsylvania: Refusal of waitress to work in an establishment serving liquor was held based upon a reasonable moral principle and was good cause. Bd. of Rev., Dec. B-38651.

Refusal to work in a distillery, even though she had taken a religious pledge not to drink intoxicating liquor was not good cause since the claimant's moral principle must be direct. Bd. of Rev. Dec. B-20882, 4-26-50 at 41,208 of the U.I.R.

Refusal to work where liquor is dispensed due to strong moral principles developed due to a tragic occurrence in her family resulting from the use of liquor was good cause. Bd. of Rev. Dec. B-38651, 2-11-55 at P. 41,208 of the U.I.R.

Refusal to work where room and board was included and certain of the new roommate's actions were offensive and employer refused to give him a new roommate was with good cause. Bd. of Rev. Dec. B-42530 at 41,290 of the U.I.R.

Refusal of a government employee to work were he was sitting around doing nothing and in effect wasting government funds is without good cause. Sabloff v. Bd. of Rev., 194 Pa Super 63, 166 A 2d 95 (1960) aff'g Bd. of Rev. Dec. B-57410 at 41,290 of the U.I.R.

Refusal to work by a Quaker where he felt he was promoting the war effort by handling parcels mailed by military establishments and literature that supported the war effort was without good cause. Bd. of Rev. Dec. B-70277 at 41,290 of the U.I.R.

Refusal to work where required to sign a form promising to take a polygraph test if the employer required it was with good cause. Bd. of Rev. Dec. B-92033 at 41,290 of the U.I.R.

Refusal to work for an employer who had deducted delinquent personal taxes passed by the city that he considered unconstitutional was without good cause since he had no right to expect the employer to join in his civil disobedience and violation of the law. Gavin v. Bd. of Rev. (1977) at 41,290 of the U.I.R.

19. South Carolina: Refusing to work on Saturday because of religious scruples disqualifies where usual occupation requires Saturday work. Strange v. E.S.C. S.C. Ct. of Com. Pleas, Greenville Co., 1955 at P. 4425 of the U.I.R.

Discharge held not for intentional wrongdoing where claimant refused Sunday shift because it conflicted with his religious beliefs. Cody v. Gibson, S. C. Ct. of Com. Pleas, Spartanburg Co., Aug. 14, 1951, at P. 4479 of the U.I.R.

20. Tennessee: Refusal to work where membership in a union was required was good cause. App. Trib. Dec. NO. 38-A7-46, Dec. 24, 1938 and Bd. of Rev. Dec. No. 44-BR-60 (9/1 UCIS Ben. Ser., 10220-Tenn. R.) at 45,168 of the U.I.R.

Seventh Day Adventist required to work Saturdays when mill went from five day week to seven day week held to not have good cause for leaving work. Denied benefits. Bd. of Rev. Dec. No. 45-BR-64 (8/11 UCIS Ben. Serv. 10055-Tenn. R.) at P. 45,142 of the U.I.R.

Claimant observing Saturday Sabbath and 4 annual holy days held available for work and eligible for benefits. Bd. of Rev. Dec. No. 54-BR-78, Mar. 11, 1954 (Tenn. B, AA-30-49, BSSUI) at P. 45,142 of the U.I.R.

A claimant whose religious beliefs did not permit her to work on Sunday was held available for work although she refused a job which would require her to work on Sunday. Trib. Dec. No. 42-A7-297, July 11, 1942, at P. 45,142 of the U.I.R.

21. Virginia: Refusal to work because of conscientious objection to war in a plant manufacturing army uniforms was held to be with good cause but rendered then unavailable for employment since practically all industry had been geared to the war effort. App. Examiner Dec. No. D-430, D-431, AE-317, September 28, 1942 at 49,111 of the U.I.R.

22. Washington: Seventh Day Adventist refusing to work on Saturdays held available and eligible for benefits. Betts v. Giovine, Wash. Super. Ct., King Co., Apr. 12, 1957, at P. 4425 of the U.I.R.

23. Wisconsin: Refusal to work for an employer who criticized members of minority groups of which claimant was not a member but who said he would stop his remarks was without good cause. Comm. Dec. No. 48-C-200 at 52,242-3 of the U.I.R.

24. Wyoming: Refusal to continued working where a bar serving liquor was added is with good cause. App. Exam. Dec. No. 1397-A7-62, 3-8-62 at 55,110 of the U.I.R.

No. 80-5902

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1980

BRENDA J. DePRIEST,

Appellant,

VS.

COMMISSIONER ROBERT J. BIBLE
TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY,

and

COMMISSIONER SAMMIE LYNN PUETT,
TENNESSEE DEPARTMENT OF HUMAN SERVICES,

Appellees.

ON APPEAL FROM THE MIDDLE SECTION OF THE

COURT OF APPEALS OF THE STATE OF TENNESSEE

# MOTION IN THE ALTERNATIVE TO DISMISS APPEAL

# OR AFFIRM JUDGMENT

Counsel of Record

MICHAEL E. TERRY
Deputy Attorney General
450 James Robertson Parkway
Nashville, TN 37219
Phone (615) 741-2640

OF COUNSEL:

WILLIAM M. LEECH, JR.
Attorney General

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## QUESTIONS PRESENTED

Whether T.C.A. § 50-1324(A) as applied to an employee of the State of Tennessee is violative of the First Amendment to the United States Constitution where the employee voluntarily chose to accept employment with the State of Tennessee with actual knowledge of the annual, sick and special leave provisions of state government service and flagrantly disregarded those provisions and left her employment and became unemployed as a result of her actions.

## TABLE OF AUTHORITIES


Braunfeld v. Brown,
366 U.S. 599, 81 S. Ct. 1144,
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Hildebrand v. Unemployment Insurance Appeals Board,
19 C.3rd 765, 140 Cal. Rptr. 151,
566 P.2d 1297 (California Supreme Court,
1977) cert. denied, 434 U.S. 1068,
98 S. Ct. 1247, 55 L. Ed. 2d 770 (1978) . . . . 4,5

Sherbert v. Verner,
374 U.S. 398, 83 S. Ct. 1790,
10 L. Ed. 2d 965 (1963) . . . . . 4

## OPINIONS BELOW

The Opinions below are set forth in the appellant's jurisdictional statement.

## Jurisdiction

The jurisdictional requisites are adequately set forth in the appellant's jurisdictional statement.

## Constitutional and Statutory Provisions

Pertinent Constitutional and Statutory provisions are set forth in the appellant's jurisdictional statement.

## STATEMENT OF THE CASE

The Appellant, Brenda J. DePriest, was employed by the Tennessee Department of Human Services as a secretary I from January to October, 1978. She was dismissed from employment on October 23, 1978 because of her irregular attendance record and the fact that she had been on unauthorized leave since October 13, 1978. The Appellant, a member of the Worldwide Church of God, took the unauthorized leave in order to participate in an eight day religious holiday - the "days of rest".

As a newly hired state employee, the Appellant as a matter of right acquired both one annual day and one day of sick leave for each month of state service. The Appellant took advantage of these leave days and used up, of her own volition, all of her annual and sick leave days accumulated during her term of state service. In addition, the appellant had also requested and been granted three other special leave days (leave without pay).

In September, 1978, just a short time before the Appellant's "days of rest" were to begin, she requested additional special leave in order to observe the holiday. Her employer

denied her request since the office she was in had a skeleton staff at the time and her absence would have caused great difficulty. The Appellant then voluntarily chose to observe the "days of rest" in spite of the denial of her request for additional special leave. As already stated, she was dismissed from employment on October 23, 1978.

The last two paragraphs of the Appellant's Statement of the Case accurately reflect what occurred after the Appellant applied for unemployment compensation benefits on October 25, 1978.

## THE QUESTION IS NOT SUBSTANTIAL

The appellant concedes that the issue presented is not a novel one, but it is also not a substantial one. The appellant tries to equate the instant case with Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) when it is clear that the case which is most nearly on point is Hildebrand v. Unemployment Insurance Appeals Board, 19 C.3rd 765, 140 Cal. Rptr. 151, 566 P.2d 1297 (California Supreme Ct., 1977) cert. denied, 434 U.S. 1065. Sherbert involved an unemployment benefits claimant who allegedly refused without good cause to accept available suitable work. Here, as in Hildebrand, the question involves the legality of a statute which denied unemployment benefits to a claimant who had already accepted employment and then left, in the wording of the statute, "voluntarily without good cause".

Although the appellant tries to picture Hildebrand as a minority decision, it is actually a reflection of the better view. As the Hildebrand court itself stated:

> . . . cases from states having comparable statutory provisions [involving the voluntarily without good cause requirement] have held uniformly that one who knowingly accepts employment involving a condition which subsequently proves unsatisfactory cannot thereafter claim 'good cause' for voluntarily terminating that employment because of later unwillingness to continue to meet the condition. [Emphasis added]. (See Department of Industrial Relations v. Scott, (1951) 36 A.a.App. 184, 53 So. 2d 882, 884; Oliver v. Creamer Heating & Appliance, (1966) 91 Idaho 312, 420 P.2d 795, 799; Friloux v. Administrator, Division of Employment Security of D & L, (La. 1962) 136 So. 2d 99, 101; In re Sellers (1961) 13 A.D.2d 204, 215 N.Y.S.2d 385, 387; Lirakis v. Unemployment Compensation Board of Review, (1961) 194 Pa. Super. 342, 168 A.2d 647, 648). The applicable principles were well expressed in Friloux, as follows:
>
> 'To constitute good cause the circumstances attending the final

> termination of the employment . . . must be compelling and necessitous and *not merely because the applicant is dissatisfied with conditions that he well knew existed at the time he accepted employment.'* (P. 101, italics added.)
>
> In other words, an employee cannot ' . . . take a job and use that job for the necessary qualifying period of employment and then, *for no reason not present in the first instance,* voluntarily quit and receive unemployment insurance benefits.' (In re Sellers, supra, 215 N.Y.S. 2d at p. 387, italics added.).
>
> While conceding that the foregoing cases do not involve termination of employment for religious reasons, we conclude that the underlying rationale of those cases is equally persuasive here within a different context.

Hildebrand v. Unemployment Insurance Appeals Board, supra, 566 P.2d at 1300.

The Appellant's jurisdictional statement attempts to show that T.C.A. § 50-1324(A) placed the appellant in the position of either violating a cardinal provision of her religious beliefs or refusing to violate those beliefs and being fired without unemployment benefits. Actually, the predicament of Appellant was entirely of her making. Her employer had provided her with more than enough annual leave and sick leave days to attend the "days of rest" with no problem. However, she had voluntarily expended all her leave and sick days. She could have avoided this litigation entirely by simply allocating her days off differently. Thus, the issue the Appellant raises is a question of personal priorities. If the "days of rest" were as important to the appellant as she contends, then it behooved her to save leave days, even if that involved some sacrifice to herself. The State has not infringed the Appellant's civil rights. She has simply created a predicament herself and she should not now be allowed to complain about the forseeable consequences of her actions.

The appellant further contends that where there is a legitimately held religious belief as to the time period involved, the First Amendment should protect a worker's right to worship at one time as well as another, and there is consequently no difference between a week of holy days and an annual holy day. The Appellant's contention would mean that whenever a person with such a legitimately held belief somehow managed to get a job, he or she would be constitutionally entitled to avoid work on those days, and to receive unemployment compensation benefits if fired. This Court should not approve such a construction. In previous cases this Court has faced this issue and declined to follow the route which appellant offers. As stated by Mr. Chief Justice Warren in the case of Braunfeld v. Brown, 366 U.S. 599, at 606-7, 81 S. Ct. 1144, at 1147-48, 6 L. Ed. 2d 563, at 568 (1960):

> . . . it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment . . .

For these reasons, the question is not substantial and this Court should deny jurisdiction or in the alternative affirm the lower court.

MICHAEL E. TERRY
Deputy Attorney General
State of Tennessee
450 James Robertson Parkway
Nashville, TN 37219
Phone (615) 741-2640